No. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Can the election of trial judges be challenged under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973?

PARTIES

The participants in the proceedings below were:

League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr. Jom Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, *Plaintiffs;*

The Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, *Plaintiff-Intervenors;*

Jesse Oliver, Fred Tinsley and Joan Winn White, *Plaintiff-Intervenors;*

The Attorney General of the State of Texas, George Bayoud, Secretary of State of Texas, Thomas R. Phillips, Mike McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, John Cornyn, Robert Blackmon, Sam B. Paxson, Weldon Kirk, Jeff Ealker, Ray D. Anderson, Joe

Spurlock II, and Leonard E. Davis, in their capacity as members of the Texas Judicial Districts Board, *Defendants;*

Judge Sharolyn Wood and Judge Harold Entz, *Defendant-Intervenors.*

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 914 F.2d 620 as *LULAC v. Clements*, and is set out at pp. 1a-182a of the appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App."). The opinion of the United States District Court for the Western District of Texas is not reported and is set out at Pet. App. pp. 183a-304a, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court

as a Supplemental Appendix to the Petition for Certiorari (hereinafter "Supp. Pet. App."). Two subsequent orders of the district court, both unreported, are set out in the Joint Appendix (hereinafter "J.A.") at pp. 158a and 180a.

JURISDICTION

The decision of the Fifth Circuit was entered on September 28, 1990. The petition for certiorari was filed on November 21, 1990. On January 18, 1991, this Court granted the petition for certiorari and consolidated this case with No. 90-974, *LULAC v. Attorney General of Texas*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

This case involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which provides that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivison are not equally open to participation by members of a class of citizens protected by subdivision (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This case also involves § 14(c)(1) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(c)(1), which provides, in pertinent part, that:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office and propositions for which votes are received in an election.

STATEMENT OF THE CASE

Introduction

This case involves a challenge to the at-large method of electing district judges in nine counties in the State of Texas.[1] The petitioners are African American voters, many of whom are members of the Houston Lawyers' Association (HLA) (hereinafter "HLA petitioners"). The HLA petitioners intervened in this lawsuit, originally filed by the League of United Latin American Citzens (hereinafter "LULAC petitioners"), alleging that several features of the existing electoral scheme -- in particular, at-large, numbered post elections -- deny them an equal opportunity to participate in the election of district judges in Harris County (Houston) in violation of §2 of the Voting Rights Act, as amended.

Harris County is the largest and most populous county in the State of Texas, encompassing 1,734 square miles. The County has a 1990 Census population of over 2.8 million. The

[1]The counties at issue are: Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland. In each of the counties challenged, more than one district judge is elected to serve the countywide district. Eight of the nine judicial districts challenged by plaintiff-petitioners are coextensive with one county. The remaining district is comprised of two counties. Pet. App. at 95a.

City of Houston, Harris County's major urban center, is the largest city in Texas geographically and by population. The enormous size of the Harris County judicial district is evident when it is compared to West Texas' District 39 -- the smallest judicial district in the state. Harris County is more than 20,000% larger than the District 39.[2] Harris County elects 59 of Texas' 386 district judges, more district judges than any other county in the state.[3]

Although the population of Harris County is nearly 20% African American,[4] and African American candidates have run in 17 contested district judge general elections in the County since 1980, only 2 of the African American candidates have won. Pet.

[2]Johnson, "Simple Justice," Background Report to House Committee on the Judiciary, Texas House of Representatives, November 1990.

[3]Although most district courts exercise both criminal and civil jurisdiction, in metropolitan areas such as Harris County, pursuant to both legislative action and informal arrangements made within the county, the district courts are organized into four specialized areas: civil trial courts, criminal trial courts, juvenile courts and family law courts. *See* "Texas Judicial System Annual Report," Texas Judicial Council, Office of Court Administration, December 1987 at 10; Deposition Summary of Ray Hardy, Trial Transcript Volume 4, Page 254 (references to the trial transcript are hereinafter cited as "TR. at __-__."). In Harris County, there are 25 civil district courts. TR. at 4-254. No African American has ever been elected to a civil district trial seat in Harris County. TR. at 3-207.

[4]The voting age population of Harris County was 18% African American according to both 1980 and 1990 census figures. Texas does not keep voter registration figures by race.

App. at 279a. Currently, only three of Harris County's 59 district judges (5% of the total) are African Americans.[5] "Texas Minority Judges," Office of Court Administration, Texas Judicial Council.

The HLA petitioners specifically alleged that alternative electoral schemes using electoral sub-districts or modified at-large structures[6] could remedy the denial of minority voters' rights in district judge elections in Harris County. J.A. at 20a.

The Challenged Electoral Structure

Under a 1985 amendment to the Texas Constitution, electoral districts for district judges must consist of one or more

[5]These figures are reflected on the statewide level, as well. Although African Americans constitute 12% of Texas' population, they constituted only 2% of the state's district judges (7 of 375) in 1989 (currently 9 of 386). "Texas Minority Judges," Office of Court Administration, Texas Judicial Council, January 31, 1991. In July 1988 when this lawsuit was filed, no African Americans were appellate court judges anywhere in the state of Texas. In fact, between 1980 and 1990, only 1 African American served as an appellate court judge in Texas. During the same time period, only 8 African Americans served as district judges statewide. *Id.*

[6]These alternative electoral schemes included limited voting and cumulative voting, both of which are discussed *infra* at 57-60.

whole counties.[7] *See* Article 5, §7(a)(i), Texas Constitution of 1876, as amended. District judges in Texas have statewide jurisdiction, but sit in the countywide or multi-county district from which they are elected. Candidates for district judge must reside in the county or multi-county district for two years in order to run for office. *See* 1990 Candidates' Guide to Primary and General Elections, Office of the Secretary of State of Texas.

Each candidate for district judge runs for a designated numerical seat within the county or multi-county district, for example, "375th district court." Elections for district judges in Texas are held in even-numbered years at the same time as primary, run-off and general elections for state legislative and municipal offices. Terms are staggered, and district judges serve for four years. District judge candidates, and indeed all judges in Texas, are nominated through party primaries. If no district judge candidate wins a majority in the party primary, then the two top voter-getters must compete in a run-off primary. In the general election, each judicial candidate's political party is

[7]The same amendment provides that districts smaller than a county may be created if approved by a countywide referendum. Yet neither the Constitution nor Texas statute creates any procedure for holding such a referendum. No countywide referendum has ever been held in accordance with this provision.

indicated on the ballot.

District judges in Texas are elected from multimember at-large districts[8] within a winner-take-all[9] election system. Both the multimember and winner-take-all features of Texas' district judge election system were challenged by the HLA petitioners in this action. J.A. at 8a-23a.

The Findings of the District Court

Following a one week trial, the district court made extensive findings of fact and conclusions of law supporting the minority voters' claims of vote dilution in each of the nine targeted counties. Following the standard for determining the existence of vote dilution set by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court found that in Harris County: (1) the African American population is sufficiently numerous and geographically compact to constitute a

[8]As the district court noted, "this system is 'at-large' because judges are elected from the entire county rather than from geographic subdistricts within the county." Pet. App. at 190a n.3.

[9]In a winner-take-all system "a *bare* political majority (fifty percent + 1) of the electorate can elect *all* representatives and totally shut out a minority." Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.-C.L.L.Rev. 173, 222 (1989). The remaining 49% of the population may be excluded from electing any candidates of choice.

majority in a number of fairly drawn sub-districts;[10] (2) the African American commmunity is politically cohesive; and (3) white voters vote sufficiently as a bloc so as usually to defeat the candidate of choice of minority voters, absent special circumstances. Pet. App. at 220a-221a.

In addition, the district court made specific findings concerning the list of objective factors (hereinafter "Senate Factors") that Congress identified as relevant to determining the existence of vote dilution.[11] Senate Report No. 97-417, 97th

[10]Plaintiffs demonstrated, in fact, that African Americans could constitute a majority in at least nine judicial electoral sub-districts. Pet. App. at 201a.

[11]These typical objective factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively

Cong., 2nd Sess. (1982) (hereinafter "S. Rep. at __").

Recognizing that among the Senate Report factors the existence of racially polarized voting and the extent to which minorities have been elected to office in the challenged jurisdiction are most significant, *Gingles*, 478 U.S. at 45 n.15, the district court made particularly extensive findings regarding these two factors.

The district court's findings with regard to racially polarized voting were based on the dramatic results of the experts' analyses. In the 17 elections analyzed by the plaintiffs' expert,

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in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiff's evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. at 28-29.

Dr. Richard Engstrom,[12] and the 23 elections analyzed by the defendants' expert, Dr. Delbert Taebel, African Americans and whites voted differently in *every* election. Pet. App. at 224a. While African Americans consistently gave more than 97% of their vote to African American candidates in the 17 judicial elections analyzed by Dr. Engstrom, whites never gave even a bare majority of their votes to an African American candidate. *Id.* at 215a.

Even straight ticket party voting and candidate incumbency failed to garner significant white votes for African American judicial candidates. One example of the virtual refusal of white voters to support African American judicial candidates in Harris County is particularly telling. In 1986, 19 Democratic incumbent judges ran for re-election. *All* 16 white Democratic incumbents were re-elected. *All* three African American Democratic incumbents lost.[13] TR. at 3-164.

Overall, Dr. Engstrom testified that, since 1980, 52% of

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[12]Dr. Engstrom's work on quantitative analyses was cited with approval by this Court in *Gingles*, 478 U.S. at 53 n.20.

[13]These 19 Democratic incumbents shared campaign strategy and tactics, posing for a group photograph which was mailed to voters throughout the County as part of a collective party effort to retain judicial seats held by Democrats. TR. at 3-209. Yet only the African American incumbents lost their bids for re-election.

white Democratic candidates have won contested district judge elections in Harris County, while only 12.5% of African American Democratic judicial candidates have won. TR. at 3-134-135.

The district court also found that of the 17 African Americans who have run in contested district judge elections in Harris County since 1980, only 2 have won. Pet. App. at 279a. In fact, it was undisputed that no more than three African Americans have ever served simultaneously as district judges in Harris County. TR. at 3-207.

With regard to the remaining Senate Factors, the district court made additional findings which supported the petitioners' claims. The court noted the "well chronicled" and "undisputed" history of discrimination in Texas, that touched upon the right of minorities to vote and participate "in the democratic system governing [the] State." Pet. App. at 274a. This history includes discriminatory legislative reapportionment, *Graves v. Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972), *aff'd in relevant part, rev'd in part on other grounds sub nom.*, *White v. Regester*, 412 U.S. 755 (1973), *on remand*, 378 F.Supp. 640 (1974), racial discrimination in education, *United States v. Texas Education Agency*, 564 F.2d 162 (5th Cir. 1977), *reh'g denied*, 579 F.2d 910 (1978), *cert. denied*, 443 U.S. 915 (1979), and the notorious refusal of the Harris County Democratic party to permit African Americans to vote in the party primary. *Smith v. Allwright*, 321 U.S. 649 (1944).[14] The court's findings were supported by the testimony of lay witnesses who attested to the historical and continued presence of racial discrimination in Texas. *See* TR. at 3-205, 217; 4-8, 16-17, 24-25.

Since 1975, Texas has been subject to the special preclearance provisions of §5 of the Voting Rights Act of 1965. Between 1975 and 1982, when the Act was last amended, the Justice Department had made 130 objections to changes in voting procedures submitted by the State of Texas, because it was unable to conclude that the changes proferred would have neither a discriminatory purpose nor a discriminatory effect on minority voters.[15] *See Voting Rights Act: Hearings on S.53, S.1761,*

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[14]The historical existence of an all-white judiciary in Texas has also been chronicled. *See e.g.*, *Ross v. State*, 233 S.W. 2d 126, 131 (Tex. Crim. App. 1950) ("[a]ll judges since the days of Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons").

[15]Since that time, the Attorney General has repeatedly objected to other voting changes in Texas, including the addition of 15 district judgeships in 1990, on the grounds that the method of electing district judges in the counties at issue violates §2. *See* Letter of John Dunne, Pet. App. at 305a-308a. A three-judge court later ruled that the objection of the Justice Department was not timely filed, and as such, the additional judgeships were automatically precleared within sixty days of Texas' submission. *Mexican American Bar Association v. Texas*, No.

S.1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. 1783 (1982) (hereinafter "1982 Hearings").

The district court further found that the legacy of racial discrimination in Texas continues to affect adversely the socioeconomic status of minorities in Texas. Pet. App. at 275a. This finding was supported by census data indicating a marked disparity in the education and median income levels of African American and white Texans. Plaintiffs' Exhibit H-08.

The district court found that Harris County uses an unusually large election district for district judge elections. Indeed, the court found that the unusually large size of Harris County "further enhance[s] the problems that minority candidates face when they seek office." Pet. App. at 276a. This conclusion was supported by defendant Thomas Phillips, Chief Justice of the Supreme Court of Texas, who testified that it is more difficult for minority lawyers to raise the funds necessary to mount a successful campaign for district judge in large urban areas such as Harris County. TR. at 5-84.

The district court also found that the requirement that

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district judge candidates run for a specific numbered judicial seat within the county is equivalent to a numbered post system, which prevents the use of bullet, or single-shot[16] voting. Pet. App. at 275a-276a, 276a n.31. The requirement that a candidate for district judge win a majority of the votes cast to win the party primary also enhances the opportunity for discrimination against minorities.[17] Pet. App. at 276a.

Finally, while the district court did not find that the current at-large system of electing district judges is intentionally discriminatory, it was "not persuaded that the reasons offered for its continuation are compelling." Pet. App. at 283a.

Considering the "totality of the circumstances,"[18] the

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[16]"Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Gingles*, 478 U.S. at 38 n.5 (citation omitted).

[17]In the Senate Report, Congress specifically identified the use of majority vote requirements, numbered posts and unusually large electoral districts as devices that "may enhance the opportunity for discrimination against the minority group." S.Rep. at 29.

[18]Plaintiff-petitioners made no claims as to Senate Factor 4 -- the existence of a discriminatory candidate slating process in Harris County. As to Senate Factor 6, the court found that racial appeals were used in at least one district judge race in Texas. TR. at 278a. The court made no specific findings on the use of racial appeals in Harris County.

Although an additional factor sometimes probative to the plaintiffs' showing of vote dilution, "[u]nresponsiveness is not an essential part of plaintiffs' case," S. Rep. at 29 n.116, and therefore was not put in issue by the plaintiff-petitioners.

district court concluded that under the challenged electoral scheme, "[p]laintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice" in district judge elections. Pet. App. at 290a-291a.

The district court made no findings about the appropriate remedy for the proven violation, but urged the state legislature, then in special session, to select and approve an alternative district judge election scheme. Pet. App. at 303a. The district court also announced that it would entertain motions to enjoin future state district judge elections "pending the Remedy Phase of this litigation," should the legislature fail to adopt an alternative election system. *Id.*

The District Court's Interim Remedy

On January 2, 1990, following the state legislature's failure to include the issue of judicial redistricting on its special session agenda, the district court entered an order setting out an interim remedy to be used solely for the 1990 election of district judges in the nine counties. J.A. at 158a. This remedy incorporated, in large part, elements of a remedial settlement agreement entered into by the petitioners and the state defendants following the

district court's determination of liability.

In the remedial settlement agreement, the state defendants agreed to the creation of electoral sub-districts for district judges. The district court's interim remedy adopted the sub-district election scheme agreed upon by the state defendants and the petitioners, but abolished the use of party identification in district judge elections.[19] J.A. at 158a-179a. Defendant-intervenors from Harris County, Texas, filed an interlocutory appeal from the district court's liability order and a stay of the district court's interim remedial order. The state defendants also appealed the district court's liability order and the part of the interim remedial order that prohibited the use of partisan elections for district judges. The state defendants did not appeal that part of the remedial order that required the creation of sub-county electoral districts. The interlocutory appeal and stay were granted by the Fifth Circuit on January 11, 1990.

The Case on Appeal

Oral argument was heard before a panel of the Fifth

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[19]Petitioners never challenged the partisan nature of the district judge election system in any of the nine counties.

Circuit in *LULAC* on April 30, 1990. Eleven days after oral argument, the panel reversed the district court opinion in *LULAC* on the ground that the election of trial judges is not covered by §2 of the Voting Rights Act, as amended. The panel decision addressed none of the underlying facts or findings of vote dilution reached by the district court.

Sua sponte, the Fifth Circuit ordered rehearing *en banc* in *LULAC*. Oral argument was heard on June 19, 1990. On September 28, 1990, the Fifth Circuit, again without reference to the merits of the case, reversed the district court's ruling in *LULAC* by a 12-1 majority. By a 7-6 majority, the Fifth Circuit also overruled its prior decision in *Chisom v. Edwards*, 839 F.2d 1056, *cert. denied*, 488 U.S. 955 (1988), and held that the "results" test for vote dilution in §2 of the Voting Rights Act, as amended, does not apply to the election of judges, "for the cardinal reason that judges need not be elected at all." *LULAC v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990). Four judges, in an opinion authored by Judge Patrick Higginbotham, adhered to the position taken by the panel that, while appellate judges are covered by § 2, trial judges are not. Judge Sam Johnson, the author of the original panel opinion in *Chisom*, dissented.

On November 21, 1990, the Houston Lawyers' Association, *et al.*, filed a petition for a writ of certiorari with this Court. The League of United Latin American Citizens, *et al.*, filed a petition for certiorari on December 14, 1990. Both petitions were granted and consolidated for review by this Court on January 18, 1991.

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act covers *all* elections, including elections for judges. Congress neither expressly nor impliedly carved out an exemption from the Act for elected judges. So long as a state chooses to select its judiciary through popular election, it must conduct those elections in accordance with the Act's prohibition against minority vote dilution.

The *LULAC* concurrence's view that trial judge elections are exempt from §2 coverage is at odds with Congress' and this Court's instructions for determining liability under §2 of the Voting Rights Act. Both Congress and this Court have mandated

that courts reviewing claims under §2 engage in a local "fact-specific" appraisal of the result of the challenged structure on minority voting strength in the particular jurisdiction. A formalistic approach to assessing a vote dilution claim is expressly prohibited.

A fact-specific analysis necessarily precludes the creation of *per se* rules exempting particular elected offices from vote dilution claims and precludes courts from elevating any one particular factor to threshold or controlling status.

Furthermore, the state's interests in using particular electoral structures cannot pretermit a §2 analysis. Indeed, the state's interests in retaining particular features of a dilutive electoral structure are entitled to little weight at the liability stage of a §2 proceeding. At the remedy stage, however, the state's interests in maintaining particular non-dilutive features of a discriminatory election structure are properly weighed and accommodated. Remedial concerns are not an appropriate basis for denying §2 coverage as a threshold matter.

ARGUMENT

I. THE ELECTION OF JUDGES IS COVERED BY §2 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

Reversing its decision in *Chisom v. Edwards*, 839 F.2d 1056, *cert. denied*, 488 U.S. 955 (1988), that judicial elections are covered by §2 of the Voting Rights Act, the court below held that Congress, in amending the Act in 1982, sought expressly to exclude the election of judges. According to the majority, Congress' provision in §2(b) that the Act is violated when minority voters have less opportunity "to elect *representatives* of their choice," (emphasis added), is dispositive of Congress' intent to exclude elected judges from §2 coverage. In the majority's view, the use of the word "representatives" necessarily and deliberately excludes the election of judges.

The Brief of the Petitioners in *Chisom v. Roemer*, No. 90-757, (hereinafter "*Chisom* Brief at __"), documents in exhaustive detail Congress' intent to include *all* elected offices under the purview of the Voting Rights Act.

First, the *Chisom* petitioners' analysis demonstrates that the express language of the statute inclues the election of judges.

Chisom Brief at 17-29. In particular, §14(c)(1) of the Act defines "voting" under the Act as

> "*all* action necessary to make a vote effective in *any* primary, special or general election, including, but not limited to . . . casting a ballot and having such ballot counted properly *with respect to candidates for public or party office* and propositions for which votes are received in an election.

42 U.S. C. §1973*l*(c)(1) (emphasis added). Moreover, the co-terminous relationship between §2 and §5 of the Act further supports the proposition that elected judges are covered under §2. In the legislative history, Congress explicitly indicated that §2 and §5 must work in tandem. The Attorney General, the official responsible for interpreting and administering §5 of the Act, has consistently applied §5 to judicial elections. This court recently affirmed that §5 of the Act covers judicial elections. *State Board of Elections v. Brooks*, 111S.Ct. 288 (1990). *See also, Martin v. Haith*, 477 U.S. 901 (1986). *Chisom* Brief at 29-32.

In the legislative history of the Act, Congress clearly expressed its intention to include all elections, including the election of judges, when both enacting and amending the Act. Indeed, Congress was aware of the role played by the elected southern judiciary in furthering the establishiment of state-

sponsored racial discrimination and in undermining the full and effective enfranchisement of African Americans. *Chisom* Brief at 32-43.

Contrary to the Fifth Circuit's interpretation, the use of the word "representatives" in §2(b) of the 1982 amendments to the Act created neither an express nor an implied exemption from §2 scrutiny for elected judges. *Chisom* Brief at 41-42.

Finally, the fact that the one-person, one-vote rule does not apply to judicial districts is irrelevant to the application of the Voting Rights Act to the election of judges. *Chisom* Brief at 43-49.

The HLA petitioners incorporate by reference the analysis and arguments advanced by the Chisom petitioners in support of these points.

In the remainder of this brief, the HLA petitioners focus on an issue not expressly addressed by the petitioners in *Chisom* -- the application of the Voting Rights Act to trial judges. Although the arguments relating to the language and structure of the Act and its legislative history apply equally to all judicial elections, additional issues were raised in the Fifth Circuit's concurring opinion, authored by Judge Patrick Higginbotham, concerning coverage of trial judges under the Act, which we

discuss herein.

II. JUDGE HIGGINBOTHAM'S CONCURRENCE DOES NOT PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE DECISION OF THE COURT BELOW

The concurring opinion written by Judge Higginbotham and joined by Judges Politz, King, and Davis (and with respect to its analysis of § 2's applicability to trial judges, by Judge Wiener as well), acknowledges that the language, structure, and legislative history of the Voting Rights Act compel the conclusion that § 2 covers judicial elections. *See* Pet. App. at 51a-90a (Higginbotham, J., concurring). But it claims that Texas' scheme for electing judges is not subject to attack under § 2 because Texas has "structure[d] its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum of judicial power at that level," Pet. App. at 91a (Higginbotham, J., concurring). The concurrence essentially maintains that the functional exclusion of African Americans from the electoral process of choosing Harris County's judges is

irrelevant as a matter of law.[20]

The concurrence is critically mistaken in four separate respects. First, it wrongly focuses on the post-election function of Texas trial judges rather than the fairness of the electoral process. Second, it improperly creates *per se* rules immunizing electoral practices from scrutiny under § 2. Third, it erroneously treats the state's purported interests in maintaining the present system as a threshold question of § 2 coverage, rather than as only one, relatively minor, aspect of the totality of the circumstances test mandated by Congress. Finally, it imports into the liability inquiry an issue more appropriately addressed at the remedy stage: the extent to which the full remedy required by § 2 can also accommodate the state's legitimate concerns. In light of these serious defects, the concurrence's analysis cannot serve as an alternative basis for affirming the judgment of the court of appeals.

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[20]Indeed, the concurrence never discusses *any* of the evidence regarding the racial dilution that results from the present system of electing trial judges in Harris County.

A. *The Concurrence's Focus on the Post-Election Functions Performed By Judges Is Fundamentally Misplaced*

The crux of the concurrence's argument focuses on how Texas trial judges act *after* the electoral process is over. Each judge, according to the concurrence, "acts alone" in deciding the cases assigned to him or her. Pet. App. at 104a (Higginbotham, J., concurring). The concurrence reasons backwards from this rather artificial view of the duties Texas trial judges perform *after* they have been elected to office[21] to conclude that "[t]here can be no dilution of votes for a single judge because each judge holds a complete judicial office." *Id.* at 93a.

The concurrence explains its conclusion by pointing out that "[s]ubdistricting [that is, electing Harris County' judges from smaller geographical districts within the county] would not create an equal opportunity for representation in decision-making. . . . What subdistricting does, rather than provide minorities with representation in all decisions, is to simply allocate judges, and thus judicial decisions, among various population groups." *Id.* at

[21]Trial judges in fact perform a number of functions jointly. They collectively elect various officials, such as the local administrative judge and the county auditor, Pet. App. at 149a (Johnson, J., dissenting), and they can even share in the adjudication of a single case, when different judges decide different preliminary matters, *Id.*

104a-105a. Thus, the concurrence continues, if Harris County's trial bench were to be elected from districts, minority litigants "have an 84.75% chance of appearing before a judge who has little direct political interest in being responsive to minority concerns." *Id.* at 107a. In short, the concurrence seems to be suggesting that African Americans are not really being injured by the present system because there is no alternative that would treat them any better.

That suggestion completely misses the point of this lawsuit. Petitioners' claim does not derive from their status as actual or potential *litigants* in Harris County's courts. Nor are they complaining about the results of judicial decisionmaking in any particular case. Rather, petitioners' claim stems from their status as registered *voters* who are seeking the right to participate equally in the process of electing judges. They are not seeking the opportunity to appear before judges politically beholden to them.[22] Thus, the decisionmaking process on which this Court

[22]Indeed, the concurrence's reasoning that Harris County's African American voters would be worse off under a districting scheme because they would have little chance either of appearing in front of a judge dependent on their political support or of having a judge "accountab[le] to minorities" deciding cases important to the African American community, Pet. App. at 107a, n. 13 (Higginbotham, J., concurring), is contrary to reason. Under the present system, of course, the African American community has *no* judges dependent on its support or accountable to it.

should focus is not *judicial* decisionmaking in individual cases, but *electoral* decisionmaking about who should sit on the bench.[23] Cf., *e.g.*, *Holland v. Illinois*, 110 S.Ct. 803, 812 (1990) (Kennedy, J., concurring) (explaining that a white defendant should be entitled to challenge the prosecution's use of its peremptory challenges to strike African American jurors, not because the defendant had been denied his rights as a litigant but because the potential jurors had been denied the right to participate equally in civic life).

That African Americans currently are shut out of Harris County's electoral process cannot be denied. Again and again, their preferred candidates have been defeated by white bloc voting. Regardless of whether African American litigants have an equal opportunity to have their cases heard in the courtroom, African American voters are entitled to an equal opportunity to have their voices heard in the voting booth. African Americans in Harris County are being denied this opportunity.

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[23]In some cases, elected officials' post-election functions may be relevant to a plaintiff's § 2 claim. If, for example, one of the elements of the plaintiffs' case was an allegation of unresponsiveness, *see* S. Rep. at 29 & n. 116, then the court might appropriately consider decisions rendered by the elected officials in the course of their duties.

In this case, petitioners did not raise the issue of the responsiveness of Harris County's elected judges to African American concerns. Accordingly, no inquiry into the court's post-election functioning is appropriate.

The concurrence concedes, as it must, that "[b]efore any suits are filed, before any cases are assigned, there is a group of judges with concurrent jurisdiction." Pet. App. at 102a (Higginbotham, J., concurring). Whatever singularity Harris County's judges possess, (which, as explained below, is a legally irrelevant event), it attaches only after they have taken office. The mere use of numbered posts in the election process no more turns judicial elections into elections for single-member offices than the use of numbered posts for legislative offices could turn those offices into single-member ones. *See* Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 18 (1991).

The bankruptcy of the concurrence's post-election function-driven analysis is powerfully illustrated by its complete inability to suggest a single way in which the day-to-day activities of judges would be affected by a change in the electoral system. Even if judges were selected by sub-districts they could obviously retain the power collectively to establish rules governing the "assignment, docketing, transfer, and hearing of all cases" within a county, Pet. App. at 97a (Higginbotham, J., concurring) (quoting Texas Gov't Code § 74.094(b)); obviously, each judge could also continue to preside over his or her assigned cases.

Moreover, as discussed fully below, sub-districting is only one of the remedial alternatives prayed for in the petitioners' complaint. Sub-districting should not function as a liability benchmark.

In sum, the fact that Harris County's 59 judges do not act in constant collaboration with one another is irrelevant to the central question of this case: whether Harris County can elect those judges in a way that denies its African American citizens the ability to participate effectively in the electoral process.

B. *Section 2 Forbids the Creation of Per Se Rules Exempting Voting Practices from Scrutiny Under the Totality of the Circumstances Test*

There is irony in the concurrence's fixation on the "function" performed by Texas trial judges after they are elected. *E.g.*, Pet. App. at 102a (Higginbotham, J., concurring). While the concurrence spends a great deal of time talking about post-election judicial functions, it completely ignores Congress' directive to take a "functional" view of the political process in asking whether minority votes enjoy an equal opportunity to participate and elect their chosen candidates. S. Rep. at 30 n. 120; *see Gingles*, 478 U.S. at 45.

The concurrence claims that, as a matter of law, § 2 can

not reach a challenge to the methods used to elect trial judges. "There can be no dilution of votes," it asserts, in situations in which officials are elected to fill separate offices. Pet. App. at 93a (Higginbotham, J., concurring). Moreover, it suggests multimember electoral districts are not subject to challenge when a state links "jurisdiction and elective base." *Id.* at 112a. The underpinnings of the concurrence's analysis are fatally flawed.

1. *Congress Expressly Disapproved of the Use of Per Se Rules in § 2 Cases*

Section 2 expressly provides that courts faced with challenges to electoral practices examine "the totality of circumstances," 42 U.S.C. § 1973(b), to determine whether minority voters have an effective opportunity to participate in the political process and to elect their preferred candidates. Congress rejected any "formalistic" approach, in favor of a "functional" one. S. Rep. at 30 n. 120. As this Court explained in *Gingles*, both the language and legislative history of amended § 2 require the trial court

> to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and

impact of the contested electoral mechanisms.

478 U.S. at 79 (internal quotation marks and citations omitted). The Senate Report's "flexible, fact-intensive test for § 2 violations," *id.* at 46, is completely antithetical to the rigid, juridically derived, theory-driven rules advanced by the concurrence in this case.

Just as "electoral devices. . . may not be considered *per se* violative of § 2," *Gingles*, 478 U.S. at 46, so, too, they cannot be considered *per se* lawful, without any consideration of the way in which they effectively freeze African Americans out of the electoral process. Indeed, to suggest that any one factor standing alone can dispose of a § 2 claim would advance precisely the kind of "mechanical" analysis that was expressly rejected in the Senate Report. S. Rep. at 29 n. 118.

The categorical, formalistic nature of the concurrence's approach is evident from its failure to mention a single factor identified as relevant to a §2 inquiry by either the statute or the Senate Report. The concurrence never touches upon the virtual exclusion of African Americans from the Harris County judiciary -- a consideration expressly identified in the statute, 42 U.S.C. § 1973(b), highlighted in the Senate Report, S. Rep. at 30, and deemed "most important" by this Court, *Gingles*, 478 U.S. at 48

n. 15. It never acknowledges the pervasive and profound racial bloc voting in Harris County judicial elections that essentially renders African American votes worthless. In short, it completely ignores "past and present reality," *Gingles*, 478 U.S. at 79; S. Rep. at 30, in favor of judicial policymaking.

2. *The Particular Per Se Exemptions Proposed by the Concurrence Are Especially Meritless*

The concurrence identifies two structural features that it asserts should exempt Texas' scheme for electing trial judges from scrutiny under §2. First, it claims that each trial judge occupies a "single-member office," and thus, no claim of vote dilution can be advanced. Pet. App. at 100a (Higginbotham, J., concurring) (relying on *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986)). Second, it claims that when a state chooses to make an office's jurisdictional base coterminous with its electoral base, no §2 challenge can be brought. Pet. App. at 112a-114a (Higginbotham, J., concurring).

It is important to face the potential breadth of the concurrence's *per se* rules. Section 2 prohibits electoral practices enacted or maintained for discriminatory purposes, as well as those which happen to result in the denial of an equal opportunity

for minorities to participate and to elect their preferred candidates. S. Rep. at 27. If the concurrence's analysis is right, then a state's decision to set up its trial bench in a particular manner specifically to ensure that African Americans have no say in the process of electing judges would be immunized from attack under § 2. Similarly, if Texas had decided to use at-large elections rather than elections from sub-districts precisely *because* this would prevent African Americans from electing any judges, that, too, would be immunized.

But that simply cannot be the law. Such attempts to abridge the voting rights of African Americans would surely violate the Fourteenth and Fifteenth Amendments. If that is the case, then they must violate § 2 as well. Neither structural feature identified by the concurrence can ultimately support the creation of a sweeping exemption from § 2.

a. *The Concurrence Improperly Invoked the So-Called "Single-Member Office Exception"*

The concurrence's assertion of a single-member office exception to §2 is completely meritless. First, as this Court noted, §2 prohibits states from imposing "*any* standards, practices, or procedures which result in the denial or abridgement

of the right to vote," *Gingles*, 478 U.S. at 43 (emphasis in original); *see* 42 U.S.C. § 1973(a), without regard to the office to which those mechanisms apply. Moreover, this Court has expressly held that §5 of the Voting Rights Act covers single-member offices. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), one of the challenged laws involved changes in the method for selecting the county school superintendent in several Mississippi counties. The Court recognized that a change in the method of electing that single official might dilute the voting strength of a county's citizens. *See also, e.g., City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987) (holding that plaintiffs could challenge the system used to elect the single county commissioner), *cert. denied*, 485 U.S. 936 (1988); *Buchanan v. City of Jackson*, 683 F. Supp. 1537, 1542 (W.D. Tenn. 1988) (finding liability in at-large election of three city commissioners, each of whom ran for a numbered post as the single official responsible for education, public works, or public safety); *Dillard v. Crenshaw County*, 649 F. Supp. 289 (M.D. Ala. 1986), *aff'd in part and remanded*, 831 F.2d 246 (11th Cir. 1987), *on remand*, 679 F. Supp. 1546 (M.D. Ala. 1988) (rejecting the adoption of a form of government containing a single-person office as violative of §2). In short, § 2 contains no

"single-member office exception."

But even to the extent that certain vote dilution claims cannot be remedied by sub-districting (for example, where there is only one position in a particular jurisdiction), that limitation is unavailing in this case. To suggest that each judge in Harris County occupies a "single-member office" completely distorts any reasonable meaning of that phrase. When the cases upon which the concurrence relies discussed the applicability of § 2 to single-member offices, they were referring to offices that were unique within their respective jurisdictions. There was only one mayor, one city council president, and one comptroller in New York City, *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986);[24] there was only one mayor in Port Arthur, Texas, *City of Port Arthur v. United States*, 459 U.S. 159 (1982);[25] and there was only one probate judge in Dallas

[24]Moreover, *Butts* cannot be read to stand for the proposition that offices are exempted from §2 if they do not involve collegial decisionmaking. *See* Pet. App. at 100a (Higginbotham, J., concurring). In fact, a significant portion of the function performed by the three offices in *Butts* was collegial: their occupants sat on the New York City Board of Estimate, the multimember body responsible for conducting a significant part of the city's business. *See Board of Estimate v. Morris*, 109 S.Ct. 1433 (1989).

[25]*Port Arthur* is especially inapposite to this case, as it did not involve § 2 at all (it was a § 5 case, and this Court has already held that § 5 covers trial judges, *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986); *State Board of Elections v. Brooks*, 112 L.Ed. 2d 243 (1990)), and no one had challenged any aspect of the

County, Alabama, *United States v. Dallas County*, 850 F.2d 1430 (11th Cir. 1988). If Harris County had only one trial judge, petitioners would be hard-pressed to challenge the *at-large feature* of his or her election.[26] But Harris County has 59 judges. Texas' decision to use numbered posts and its rules governing judicial duties simply do not transform the 59 technically fungible judges into 59 discrete offices. *See* Pet. App. at 155a-160a (Johnson, J., dissenting); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518 (M.D. Ala. 1989); Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 18-19 (1991).

b. *The Concurrence's Reliance on the Congruence of Electoral and Jurisdiction Bases Is Misplaced*

The second *per se* rule advanced by the concurrence rests on its belief that when an official's "elective base and jurisdiction" are linked, § 2 cannot be used to uncouple the two by requiring

procedure for electing the city's mayor.

[26]However, petitioners would still have standing to challenge other electoral features of such a system such as its winner-take-all majority vote requirement. *See supra* at nn. 9 and 17.

the disaggregation of multimember districts.[27] *Pet. App. at 105a* (Higginbotham, J., concurring).

As an initial matter, it is important to realize that in *every* at-large election system a coterminous electoral and jurisdictional base exists. When a city council, for example, is elected at-large, each council member's elective base is the entire city, and she is expected to represent the interests of the entire city. Indeed, the linkage of elective base and post-election responsibility is precisely the justification for at-large elections. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion); *id.* at 82 (Blackmun, J., concurring in the result); *1982 Hearings* at 1310 (testimony of Henry Abraham); *id.* at 1358-59 (statement of James Blumstein). Yet, Congress made it crystal clear in 1982 that at-large elections are not *per se* immune from attack. Indeed, § 2 was amended expressly to repudiate this Court's analysis in *Bolden* and to make explicit the statutory basis for challenging at-large elections. S. Rep. at 15-16 & 27.

If anything, it is *less* necessary to link elective and jurisdictional bases for judges than for other elected officials. Judges, unlike members of state legislatures, city councils, boards

[27] Again, the concurrence presumes that sub-districting is the only remedial alternative, which is not the case here. *See infra* at 56-60.

of education, or other local commissions, are not permitted to be partisan champions of the electorate that selected them. Judges would violate their oath of office if they were to decide cases in favor of litigants from the county that elected them. Since judges do not represent their constituents in the sense of adopting popular preferences as decisions in individual cases, it is *less* important that a judge's jurisdiction cover only those persons who elected him or her than it is, for example, that a city council member's jurisdiction cover only persons in his or her electorate. *Cf. Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (upholding an Alabama statute giving city's police jurisdiction over unincorporated communities within a few miles of their boundaries).

At bottom, the concurrence's linkage argument is entirely dependent on its analysis of the state's purportedly distinctive interests in structuring elections for its judicial system in a fashion that clearly would be subject to invalidation under § 2 if it applied to elections for any other office. As discussed fully below, Texas' history and present system of electing its judges shows a consistent state interest in treating judicial elections like all other elections. In addition, under §2, the state's interests in particular electoral features do not pretermit an analysis of the totality of

relevant circumstances, but are simply one factor among many to be considered at the liability stage. Here, the state failed to identify any interests that outweigh African American voters' interests in a racially fair electoral system. The concurrence has improperly injected interests appropriately considered only at the remedy phase into its assessment of liability.

C. *Texas Treats the Election of District Judges Like All Other Elections*

In every respect, Texas treats judicial elections like elections for non-judicial offices. Although Texas has been required to comply with both § 5 of the Voting Rights Act, *see supra* at 13 and n. 15, and § 2 of the Act for non-judicial elections, *see e.g.*, *White v. Regester*, 412 U.S. 755 (1973); *Jones v. Lubbock*, 727 F.2d 364 (5th Cir. 1984); *LULAC v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989), Texas now seeks to exempt judicial elections from

coverage under § 2.[28] But because Texas historically has treated *all* elections the same, it may not exclude judicial elections from the obligations imposed by §2 by mere fiat.

The decision to elect judges by popular election is controlled by individual state policy. The Constitution reserves to states great latitude in choosing a method of selecting judges. States may appoint judges without offending the Constitution.[29] *Holhouser v. Scott*, 335 F.Supp. 928, 930-932, (M D.N.C. 1971) (republican form of government does not require election of state court judges), *summarily aff'd.*, 409 U.S. 807 (1972).

Originally, most states provided for the appointment of judges, but by the middle of the 1800s, there was growing public pressure led by Andrew Jackson's criticism of an unelected judiciary, to make judges more representative of the public by "subject[ing judges] to direct, periodic popular review in elections." D. Adamany, P. Dubois, "Electing State Judges," 1976 Wisconsin Law Review 731, 769 (1976). Beginning with New York in 1846, by the outbreak of the Civil War, 22 states

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[28]Texas recently sought preclearance under § 5 for the addition of district judgeships. *See supra* at n. 15.

[29]A shift from an elective to an appointive system could, however, violate the Voting Rights Act. *See* House Report No. 97-227, 97th Cong., 1st Sess., at p.18 (1982) (hereinafter "House Report at __").

had adopted the partisan election system for judges. Hill, "Taking Texas Judges Out of Politics: An Argument for Merit Selection." 40 Baylor L. R. 339, 346 (1989). Texas adopted an elective system in 1850.

As historian James Hurst has noted, the move to select judges by popular election rather than by appointment was a "highly self-conscious choice of policy." J. Hurst, *The Growth of American Law* 140 (1950). Proponents of an elected judiciary argued that while judicial independence was a goal shared by all, it was simultaneously necessary to ensure that state judges were aware that they were responsible to all of the people of the state. Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860," 45 Historian 337, 348 (May 1983).

Texas, in particular, has demonstrated a strong policy in favor of public participation in the selection of judicial candidates. Despite repeated attempts in the legislature to re-introduce an appointive system of selecting judges since the creation of its Constitution in 1876, Texas has consistently refused to adopt even

a limited appointive system for the selection of judges.[30] *See* Hill at 354; Champagne, "The Selection and Retention of Judges in Texas," 40 Southwestern L.J. 53, 57 (1986).

Judicial elections operate just like other Texas elections. Primary and general elections for judges are held at the same time as elections for state legislators and municipal officers. Judicial candidates are bound by the same election rules and regulations as non-judicial candidates. Candidates running for district judge, for example, are required to pay to the Democratic or Republican party a filing fee comparable to that required from legislative candidates. *See* Tex. Elec. Code §172.024.

Like elections for non-judicial officers, judicial elections in Texas are partisan. In the case at hand, for example witnesses

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[30]As argued by the *Chisom* petitioners, and incorporated herein by reference, *see Chisom* Brief at 51-56, this state policy decision to select judges by popular election carries with it the responsibility to conduct those elections in accordance with the Constitution and federal law. Just as Texas could not require a literacy test as a prerequisite to voting, Texas cannot avoid the other conditions imposed on elections by the federal government. This Court has cautioned that "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government." *Smith v. Allwright*, 321 U.S. 649, 657 (1944).

This Court has also specifically cautioned against treating the state judiciary as "a mystical entity" and state judges "as anointed priests set apart from the community." *Landmark Communications v. Commonwealth of Virginia*, 435 U.S. 829, 842 (1978) (quoting, *Bridges v. California*, 314 U.S. 252, 291 (1941) (Frankfurter, J., dissenting).

testified that incumbent Democratic judges in Harris County campaigned and raised funds together, and posed for a picture to be used in a mass mailing that encouraged voters to re-elect the Democratic slate of judges. *See e.g.*, TR. at 3-211.[31]

In addition, trial judge districts tend to be coterminous with the districts from which non-judicial officers are elected. As one Texas commentator has observed, "the demographics and design of [trial court] judicial districts bear striking similarity to districting plans which have been judicially overturned at every level of government, from school boards to Congressional districts" in the state. Johnson, "Simple Justice," Background Report to House Committee on the Judiciary, Texas House of Representatives (November 1990).

Since Texas treats its trial judge elections no differently than any other elections, elections for trial judges are entitled to

[31]Texas' judicial elections often receive more nationwide attention for their competitiveness, and the sometimes astronomical sums of money contributed to judicial campaigns, than elections for legislative and other non-judicial offices. *See* Woodbury, "Is Texas Justice for Sale?," *Time*, January 11, 1988 at 74; "'60 Minutes' Examines Controversy Over Donations to Judges," *Houston Post*, Dec. 7, 1987, at 2A, col. 1. Campaign contributions, not the qualifications of the candidates, often play a significant role in the outcome of judicial elections in Texas. Hill, at 341 ("The role of large contributors to judicial campaigns is critical since there is a high correlation between campaign contributions and electoral success.")

no special judicially-created exemption from §2. Indeed, in the 1982 legislative history to §2, specific reference was made to the very Texas district court judgeships at issue in this case. Moreover, nearly every reference to judicial districts in the legislative history of the Act refers to trial judge districts. *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. at 38, 937, 1188 (1981).

D. *A State's Interest in Particular Electoral Features Cannot Insulate Those Features from §2 Review*

The state and the concurrence argue that even though the result of maintaining the current method of electing district judges virtually excludes African Americans from an equal opportunity to elect their candidates of choice as district judges, the state's interests in maintaining the at-large system pretermit a liability finding under §2.

As a matter of law, this interpretation of the Act's application and the role of the state's interest in determining liability under §2 is fundamentally at odds with Congress' judgment. Congress has expressly *rejected* the notion that state's

interests in particular electoral structures may be elevated above the right of minority voters to full and effective enfranchisement. In enacting the Voting Rights Act, Congress articulated a national policy placing minority voters' rights before political tradition and state policy. *See* S. Rep. at 5 (statute enacted to "create a set of mechanisms for dealing with continued voting discrimination . . . comprehensively and finally.") Thus, the state's interest in an educated electorate, for example, *see Lassiter v. Northampton*, 360 U.S. 45 (1959), no longer justifies the maintenance of a literacy test as a prerequisite to voting.[32] *Oregon v. Mitchell*, 400 U.S. 112 (1970)(upholding 1970 amendments to the Voting Rights Act suspending the use of literacy tests nationwide). Similarly, a state's policy favoring at-large elections cannot justify their maintenance if that structure dilutes minority voting strength.[33] Congress has exercised its political judgment and decided that states' interests must yield to the Congress' interest in eradicating

[32]The state's interest in administrative convenience also cannot outweigh minority voters' rights to be free from restrictive registration practices. *PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987)

[33]This is especially true where, as here, the trial record does not support, or even mention, most of the interests that concern the concurrence.

racial discrimination in voting.[34] The Fifth Circuit cannot re-evaluate Congress' decision to give primacy to the interests of minority voters, and substitute its own judgment about the proper weight to be afforded the state's interests.[35]

In setting out the standards for assessing claims under amended §2 of the Act, Congress did not invite courts to use the state's interests to trump the plaintiffs' right to participate in an electoral and political process free from racial discrimination. Indeed, Congress suggests exactly the converse. Proof that the state's policy underlying a challenged electoral practice or system is tenuous may have probative value "*as part of the plaintiffs' evidence*" in establishing a violation under amended §2. S. Rep at 29 (emphasis added). Congress does not provide that the state may assert the non-tenuousness of the policy underlying the use of a challenged electoral structure as an affirmative defense to a vote dilution claim, as Texas attempts in the case at hand. *See e.g.*,

[34]Although in *Gingles* the State of North Carolina similarly argued that its interests were served by the use of multi-member districts in that state, this Court notwithstanding unanimously affirmed the district court's finding that those interests did not outweigh the plaintiffs' showing of vote dilution. *Thornburg v. Gingles*, Brief of Appellants at 3 (1985).

[35]In any case, it is a well-established principle that state policies are only to be honored by courts only to the extent that they do not undermine rights guaranteed under the Constitution and federal statutes. *White v. Weiser*, 412 U.S. 783, 795-797 (1973); *Smith v. Allwright*, 321 U.S. at 657.

S. Rep. at 195 (additional views of Sen. Robert Dole, the architect of §2(b)) (amended §2 rejects composite standard in which defendants may rebut a showing of discriminatory results by showing non-discriminatory state interest behind challenged practice). To elevate, as the concurrence does, the interests of the state in maintaining particular, albeit discriminatory, electoral features to a threshold coverage question simply re-introduces the intent standard, which Congress expressly repudiated when it amended §2.

Moreover, the state's articulation of *even important* non-racial interests in maintaining a particular election structure is of little probative value under the amended Act.[36] Thus, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." *United States v. Marengo County Commission*, 731 F.2d 1546, 1571 (11th Cir.)(quoting Senate Report at 29 n.117), *cert. denied*, 469 U.S. 976 (1984). The state's interests are but *one factor* which may be considered in the "totality of

[36] "Benign explanations may be offered for why these methods have been selected, but the results [are] telling: minorities remain severely underrepresented in county[wide]" judicial office. House Report at 20; *see also*, S. Rep. at 195.

circumstances," and, in fact, are not among the factors identified by this Court or by Congress in the Senate Report as the most important. *Gingles*, 478 U.S. at 45 n.15 (identifying the extent of minority electoral success and the existence of racially polarized voting as the most important and relevant factors).

E. *The District Court Properly Found that the Interests Advanced by the State Are Not Compelling*

At trial, the state articulated its interest in equalizing the judicial dockets and maintaining judicial independence as a basis for perpetuating the use of countywide electoral districts for district judges. The *LULAC* concurrence raised an additional concern that litigants, under a sub-county election scheme, would appear before judges over whom they have no electoral control. Pet. App. at 107a-108a. This issue was also raised on appeal by the state. None of these interests, however, were supported by evidence in the record. Moreover, Texas' current electoral practices do not support the concerns raised by the state at trial, as discussed below. Accordingly, the district court, based on the evidence in the record, found that the state's proferred interests in maintaining the at-large method of electing district judges were not "compelling." Pet. App. at 283a. Instead, the district court

was persuaded that the state's articulated interests could be accommodated "under a single member scheme or . . . other [alternative electoral] scheme." *Id.* at 284a.

The Fifth Circuit, in reviewing the district court's findings, improperly substituted its own interpretation of the evidence presented, completely ignoring the clearly erroneous standard of Rule 52(a). *Gingles*, 478 U.S. at 78. With regard to §2 vote dilution claims, in particular, this court has specifically instructed reviewing courts to afford great deference to the factual findings of the trial court judge who is better acquainted with the "indigenous political reality." 478 U.S. at 79-80. In *LULAC*, the trial court's findings as to the state's articulated interests were amply supported by the record.

First, the state's claim that the 1985 amendment to the Texas Constitution requiring that electoral districts for judges consist of whole or multi-counties was enacted in furtherance of a broader state judicial reform effort to equalize the dockets of judges is entirely unsupported by *any* facts or testimony in the record. *See* Testimony of defendant Chief Justice Thomas Phillips, TR. at 5-78. Chief Justice Phillips was unable to explain how the countywide election requirement furthered the state's

asserted interest in equalizing the dockets.[37] *Id.*

Similarly, nothing in the record supported the state's concern that judges elected from sub-county districts would be vulnerable to improper pressures from special interests and organized crime. To the contrary, one defendant-intervenor testified that he knew of no instances in which the independence of Texas' Justices of the Peace, who are elected from sub-districts, has been questioned. TR. at 4-90.

Moreover, the state's assertion that elections from sub-county districts will undermine the independence of district judges is belied by the existence of at least 61 district courts in Texas, elected from countywide or multi-county districts with populations of 50,000 or less. If Harris County, with a population of 2.8 million were divided into 59 equally populous judicial sub-districts, for example, each district would have a population of approximately 47,000 residents. Evidently, Texas currently elects judges from districts with comparable, and in some counties

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[37]The state's articulated interest in equalizing the court's dockets is not supported, in fact, by a review of the court dockets in varying counties. In 1988, for example, more cases were docketed and reviewed by the courts in Dallas, Bexar and Travis counties, than in Harris County, yet Harris County is assigned more district judges (59) than any other judicial district in the state. Johnson, "Simple Justice," Background Report of the Committee on the Judiciary, Texas State House of Representatives (November 1990).

smaller, populations than the population contemplated in the hypothetical 59 sub-district remedy for Harris County that was objected to by the concurrence.[38] No one has ever suggested that the judges currently serving in the 61 counties referred to above or the state's Justices of the Peace are biased decision-makers, influenced by organized crime. In light of the complete absence of any evidence in the record to support this asserted interest, the state cannot legitimately assert that sub-districts created to cure racial vote dilution in Harris County would produce such sinister results.[39]

The concurrence also relies on the state's purported interest in maintaining a link between the electoral and jurisdictional base for district judges. In addition to its previously

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[38]Other states, undoubtedly also concerned with maintaining a fair and independent judicary, elect judges with citywide or countywide jurisdiction from sub-districts, and this process has been upheld. *See e.g.*, *Holhouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (upholding statute permitting judges with statewide jurisdiction to be elected from districts; also upholding transfer of district judges from one district to another for temporary or specialized duty); *Cox v. Katz*, 294 N.Y.S. 2d 544 (1968) (upholding constitutionality of electing judges with citywide jurisdiction from districts within each borough).

[39]Implicit in the state and the concurrence's asserted concern is an assumption that African American judges elected from sub-districts would be more susceptible to special interest influence than the white judges who currently serve in districts virtually equally in size to the hypothetical majority African American sub-districts. There is nothing in the record to suggest that African American judges would be less likely to uphold the judicial oath of fairness and impartiality than currently sitting white judges in small counties.

discussed legal flaws, *see supra*, at 37-40, this analysis is also factually unfounded. District judges in Texas do not, in fact, have a coterminous electoral/jurisdictional base because Texas district judges have statewide jurisdiction and may hear cases anywhere in the state. *See Nipper v. U-Haul*, 516 S.W.2d 467 (Tex. Civ. App. 1974); *Reed v. State of Texas*, 500 S.W.2d 137 (Tex. Crim. App. 1973). Thus, if the concurrence's interpretation is correct, Texas currently violates the rights of litigants who appear before out-of-county judges.[40]

Indeed, the reality of judicial administration in Texas is at odds with the state and the concurrence's view that litigants have a right to have their cases adjudicated by judges over whom they have electoral control. Judges in Texas, in fact, often sit in counties from which they were not elected in order to assist with docket control. TR. at 5-120. Litigants in Texas, therefore, frequently appear before judges over whom they have no electoral control. In addition, under the current system, cases are assigned to judges "at random," and may be freely transferred between

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[40]The dissent addresses this argument in detail at Pet. App. at 169a-174a. In any case, if Texas views this interest as important then it may accommodate that interest by proferring a remedial plan than preserves the protections currently offered by its venue rules. Texas is also free, of course, to adopt new venue rules to protect its interests once a remedial plan is adopted. These options are to be explored, however, at the remedial stage of §2 litigation. *See infra*, at 56-61.

judges. Litigants, therefore, have no expectation, of appearing before any particular judge. TR. at 2-55.

The state's purported policy in favor of countywide electoral jurisdictions for judges is most significantly undermined by the state's own law which permits the election of judges from sub-county districts. Art. 5, §7(a)(i), Texas Constitution of 1876, as amended.[41]

In short, Texas' asserted interests in the maintenance of the current judicial election method were properly weighed by the district court. Against these unsupported interests, the district court weighed the overwhelming evidence in the record that African American voters are prevented under the current election system from electing their candidates of choice as district judges.

Among the most compelling evidence relied upon by the district court were the racially polarized voting analyses of both parties' experts. They showed that white voters and African

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[41]The state's most clearly articulated policy is one which favors the involvement of the voters in the selection of the state's judges. As discussed above, Texas has maintained and reaffirmed this policy repeatedly during the past 124 years. The current system, which demonstrably excludes minority voters from the state's judicial electoral process in Texas' most populous counties, itself runs counter to Texas' interest in public selection of the judiciary. Having delegated to voters the right to elect all of the state's judges, Texas' policy would be served better by the inclusion of *all* of the voters -- including minority voters -- in the judicial election process.

American voters in Harris County voted differently in *every* election in which a white candidate faced an African American opponent. African American voters consistently gave 97% of their votes to African American candidates, while whites *never* gave even a bare majority of their votes to an African American candidate. Even within the same political party, there was a 40% disparity in the success rates of African American and white district judge candidates in general elections. TR. at 3-134-135.

The virtual refusal of white voters in Harris County to elect African American judicial candidates was most boldly evidenced by the 1986 the re-election bid of 19 incumbent Democratic judges, in which all of the 16 white Democrats won, while all three African American Democratic incumbent judges lost. The record showed that as a result of the dilution of African American votes, only 2 African Americans were elected as district judges between 1980 and 1988. The full weight of the evidence in the record leads to the inescapable conclusion that racial vote dilution exists in Harris County district judge elections.

The district court properly found that in the context of the political reality in Harris County, the state's unsubstantiated interests were not compelling.

F. *Section 2 Provides States with the Opportunity at the Remedy Stage to Devise Election Methods that Protect their Legitimate Interests*

Although the state's interests in perpetuating the use of a dilutive electoral scheme cannot be afforded controlling or even significant weight in determining liability under §2, the Act provides for the protection of the state's legitimate interest in retaining the non-dilutive features of such an electoral scheme. These interests are properly accommodated at the remedy phase of the litigation.

At the remedy stage, the state is afforded the *first* opportunity to fashion an alternative election plan[42] that remedies the proven violation and serves the state's bona fide interests.

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[42]Despite the concurrence's attempt to analyze the apprpriateness of a sub-district remedy for the election of district judges in Harris County, no remedies, save the interim remedy ordered by the district court, were offered by either party, in the case at hand. The illustrative maps offered by the plaintiffs at trial were *not* proposed remedial plans. Those demonstrative exhibits were offered for the limited purpose of illustrating the causal nexus between the challenged election scheme and the dilution of minority voting strength, in accordance with this Court's direction in *Gingles*. 478 U.S. at 45. Plaintiffs may use other methods to illustrate the effect of the challenged election scheme on minority voting.

In *Gingles*, the illustrative map exhibited by the plaintiffs at trial was not the remedial plan ultimately approved by the district court. In fact, in that case, the court ultimately adopted the plan submitted by the state, over the plaintiffs' objections, as the remedy. *See Gingles v. Edmisten*, 590 F.Supp. at 381. Thus, the plaintiffs' demonstrative exhibits provide a limited basis, at best, upon which a court can determine effectively the appropriateness of a sub-district remedy. Certainly denying liability based on objections to the hypothetical sub-district maps offered at trial is utterly unfounded.

McDaniel v. Sanchez, 452 U.S. 130, 150 n. 30 (1981). The state also may object to elements in a plaintiff's proposed plan which undermine those interests. In reviewing proposed remedial plans, the court is required to defer to the state's proferred plan, so long as it completely cures the violation "and is not itself vulnerable to legal challenge." *White v. Weiser*, 412 U.S. 783, 797 (1973).

In the instant case, both Texas and the concurrence advanced interests that they claim will be undermined by the use of electoral sub-districts, which they assume is the only available remedy in this case. Sub-districts, however, are not the only remedy available to cure the vote dilution proven by African American voters in Harris County.[43]

Indeed, the HLA petitioners specifically alleged in their complaint in intervention that "the use of a *non-exclusionary at-large* voting system could afford African Americans an opportunity to elect judicial candidates of their choice." J.A. at 20a. The HLA petitioners identified at-large limited and cumulative voting, in particular, as election methods that would

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[43]However, the use of electoral sub-districts for judges with countywide jurisdictions has also been approved as a remedy under the Voting Rights Act. *See e.g., Martin v. Mabus*, 700 F.Supp. 327, 332 (S.D.Miss. 1988) (approving remedial plan adopting sub-districts for election of chancery, circuit and county court judges).

give African Americans a more equal voice in the election of district judges. Both limited and cumulative voting remedies preserve the countywide nature of the district judge election scheme, but undercut the racially exclusionary "winner-take-all" quality of the at-large structure that denies minority voters in Harris County the opportunity to elect their candidates of choice to judicial office.[44]

These potential remedies, which the petitioners and the district judge anticipated would be explored at the remedial stage, *see* Pet. App. at 303a (court will entertain motions to enjoin future elections "pending the Remedy Phase of this litigation"), address many of the concerns raised by the state and the concurrence with regard to the appropriateness of a sub-district remedy for trial judge elections.

If the parties had been permitted to proceed to the remedy phase of the litigation, the petitioners were prepared to entertain a claim by the state that the use of limited and cumulative voting

[44]In a limited voting election scheme, for example, each voter is limited to voting for less than full slate of candidates. A cumulative voting scheme, on the other hand, permits each voter to aggregate as many votes as there are seats to be filled to cast for their preferred candidate. In both electoral schemes, the at-large feature of the election scheme is maintained. *See* Karlan, "Maps and Misreadings" at 223-236. These modified at-large systems provide a realistic alternative to sub-districting to cure a proven §2 violation.

would be an acceptable remedy to cure the proven violation in this case. As both remedies provide electoral opportunities for minority voters without relying on geographic sub-districting, the coterminous electoral/jurisdictional base for Texas district judges that the concurrence deems vital to the function of trial judges, could be retained. These remedies are acceptable under the Act, so long as they fully remedy the prior dilution.[45] S. Rep. at 31. *See e.g., Dillard v. Chilton County Bd. of Educ.*, 699 F.Supp. 870 (M.D. Ala. 1988), *summarily aff'd*, 868 F.2d. 1274 (11th Cir. 1989) (adopting magistrate's recommendation that cumulative voting be used for election of county commission and school board); *Dillard v. Town of Cuba*, 708 F.Supp. 1244 (M.D. Ala. 1988) (limited voting scheme acceptable under §2 for city council elections). The use of these voting systems has been upheld for a broad array of elected offices, including trial judges. *See e.g.*, *Orloski v. Davis*, 564 F.Supp. 526 (M.D. Pa. 1983) (upholding use of limited voting scheme to elect Pennysylvania Commonwealth Court); *Cintron v. Romero-Barcelo*, 671 F.2d 1,

[45]One expert has already concluded that "[l]imited voting is a viable remedial system" for the election of district judges in Harris County. Issacharoff, "The Texas Judiciary and the Voting Rights Act: Background and Options," December 4, 1989 at 18, attached as Appendix "B" to HLA-intervenors Supplemental Brief on Rehearing En Banc.

6 (1st Cir. 1982) (holding that limited voting scheme for election of Commonwealth representative is "reasonable" and facilitates minority representation); *Hechinger v. Martin*, 411 F.Supp. 650 (D.D.C. 1976) (three-judge court) (upholding limited voting scheme for District of Columbia city council elections) *aff'd per curiam*, 429 U.S. 1030 (1977).

The availability of these remedial alternatives undermines the very basis upon which the concurrence denies the plaintiffs' relief in Texas: that a sub-districting remedy would undermine Texas' purported interest in preserving the countywide election system for trial judges.[46] More importantly, the availability of remedies which do not involve sub-districting demonstrates the danger of the concurrence's premature consideration of remedial issues.

Had the concurrence applied the correct legal standard in this case, it would have been obliged to affirm the district court's factual findings as not clearly erroneous. Instead, it elevates its speculative musings about several hypothetical state interests to pretermit the totality of circumstances analysis of

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[46]A discussion of these electoral alternatives and their relevance to this case was briefed and argued by the HLA petitioners before both the panel and the *en banc* court. Judge Higginbotham's extensive panel opinion and concurrence, however, fail to address this critical issue.

liability, treating the case as an opportunity for creative judicial construction both of the relevant statute as well as the relevant facts.

The concurrence's misguided analysis obscures the most important issue in the case at hand: African Americans are effectively shut out from meaningful participation in the election of district judges in Harris County. Despite the many theoretical and policy-oriented issues raised and discussed by the Fifth Circuit in *LULAC*, this factual reality -- the exclusion of minorities from the judicial electoral process -- is never addressed. The ability of minority voters to participate in the political process, however, is the federally protected interest at the core of this case.

As "the major statutory prohibition of all voting rights discrimination," S. Rep. at 30, Congress intended the Voting Rights Act to eliminate racial discrimination in voting "not step by step, but *comprehensively* and *finally*." *Id.* at 5 (emphasis added). As part of this goal, Congress intended to enfranchise meaningfully African Americans citizens in all elections, including those for trial judges.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand this case for a determination of the appropriate remedy.

Respectfully submitted,

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